

ACA Employer Penalty Tax Update: *Responding to Letter 227*



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ACA EMPLOYER PENALTY TAX UPDATE: RESPONDING TO LETTER 227

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Many applicable large employers received an unpleasant surprise earlier this year when they received Letter 226-J, which imposed an employer shared responsibility payment (ESRP) under Section 4980H of the Internal Revenue Code on Forms 1094-C and/or 1095-C filed for the 2015 calendar year. Employers were required to respond to Letter 226-J within a short 30-day period, which in some cases was difficult as extensive data needed to be retrieved and vendors may not have been cooperative.

As the next step in the penalty assessment process, an employer will receive one of five forms of Letter 227. The IRS has created a webpage called "Understanding Your Letter 227", which includes the form of each letter and provides some answers to common questions: <https://www.irs.gov/individuals/understanding-your-letter-227>

The various forms of Letter 227 are acknowledgement letters sent by the IRS to close an ESRP inquiry or provide the next steps to the employer regarding the proposed penalty assessment.

- **Letter 227-J** acknowledges receipt of the signed Form 14764, ESRP Response, in which the employer agreed to the penalty assessment, and that the ESRP will be assessed. No response is required, but the IRS will expect payment of the penalty that

was assessed. If payment is not made within 10 days from the date of the letter, the employer will receive a Notice and Demand for the balance due.

- **Letter 227-K** acknowledges receipt of the information provided in response to Letter 226-J and states that the ESRP has been reduced to zero and the employer does not owe a penalty.
- **Letter 227-L** acknowledges receipt of the information provided and shows that the ESRP has been revised (i.e., that the IRS accepted some but not all of the employer's arguments that the penalty should not be assessed). This letter includes an updated Form 14765 (PTC Listing) and revised calculation table.
- **Letter 227-M** acknowledges receipt of the information provided and shows that the ESRP did not change (i.e., that the IRS did not agree with any arguments the employer made that the penalty was not due). The letter provides an updated Form 14765 (PTC Listing) and revised calculation table.
- **Letter 227-N** acknowledges the decision made in Appeals and shows the ESRP based on the Appeals review. After issuance of this letter, the case will be closed and no response is required.

If an employer receives Letter 227-L or Letter 227-M and the employer does not agree with the penalty assessment, the employer should request a meeting or telephone conference with the supervisor of the IRS contact person identified in the letter. If the employer does not want to request a meeting or telephone conference, or the employer does not agree with the IRS assessment after the meeting or conference, the employer may request a conference with the IRS Office of Appeals.

The process by which an employer may request an appeal depends on the amount of the assessment being disputed.

- **Small case request.** If the total combined ESRP being disputed is \$25,000 or less, the employer should send the IRS a letter requesting consideration by Appeals. The letter should state the reason why the employer does not agree with the assessment.
- **Formal protest.** If the total combined ESRP being disputed is more than \$25,000, the employer must submit a formal written protest requesting consideration by the IRS Office of Appeals. The requirements for filing a formal protest are explained in Publication 5, "Your Appeal Rights and How to Prepare a Protest if You Don't Agree," which will be included with Letter 227-L or 227-M.

If the employer requests a conference with the IRS Appeals Office, an appeals officer will contact the employer. The Appeals Office is an independent office and, according to the IRS, most disputes considered by the Appeals Office are resolved informally and promptly.

In any case where the IRS has assessed a penalty, either in Letter 227-J or after appealing the assessments made in Letters 227-L or 227-M, the letters note that the ESRP is subject to IRS lien and levy enforcement actions. Interest will continue to accrue from the date of the Notice and Demand until the employer pays the total ESRP balance due. The IRS can apply any federal tax refund to the ESRP amount that the employer owes until it is paid in full.

If an employer receives a Letter 227-J, 227-L or 227-M assessing an ESRP, the employer should review the letter promptly and determine its strategy for responding. We recommend that an employer consult an

attorney who is experienced in the nuances of Forms 1094-C and 1095-C and can assist you in constructing a response.

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